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Supreme Court, U.S.
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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1992

AMERINET, INC., a MINNESOTA CORPORATION d/b/a AMERINET/ GENESIS, and KAIBAB NATIONAL GROUP, INC., a MINNESOTA CORPORATION, d/b/a GENESIS SYSTEMS CORPORATION,

Petitioners,

v.

XEROX CORPORATION, a NEW YORK CORPORATION,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Petitioners, Amerinet, Inc. and Kaibab National Group, Inc., were formerly engaged in the business of re-selling new and used data processing equipment, including printers. Among other things, the Respondent, Xerox Corporation, manufactures and sells laser printers. Xerox also supplies parts for said printer and services them. Petitioners became involved in reselling used Xerox laser printers and brought this action against Xerox alleging that Respondent had violated the Sherman Act by engaging in policies and conduct which constituted monopolization or attempted monopolization and tying. Tort claims were also raised under Minnesota law. The District Court for the District of Minnesota granted summary judgment on all antitrust claims and some tort claims, and the remaining tort claims proceeded

and the remaining tort claims proceeded to a jury trial. A verdict favorable to Petitioners was rendered on their tortious interference claim and judgment n.o.v. was denied by the District Court. The Eighth Circuit affirmed the grant of partial summary judgment but reversed the denial of judgment n.o.v. and remanded the case with direction to enter judgment in favor of Xerox on that claim. This petition presents the following questions:

1. In reversing the District Court's denial of judgment n.o.v. and in directing judgment for Xerox on the tortious interference claim, did the Eighth Circuit greatly depart the accepted, constitutionally founded standards of review concerning jury verdicts which require that such verdict be upheld?

2. In granting and affirming summary judgment on the antitrust claims, did the

lower courts dramatically depart from accepted summary judgment standards which require the denial of summary judgment?

LIST OF PARTIES AND RULE 29.1 LIST

The caption of this petition identifies all parties in the lower court. The Petitioners, Amerinet, Inc. and Kaibab National Group, Inc., have no parent corporation or subsidiaries.

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AMERINET, INC., a MINNESOTA CORPORATION d/b/a AMERINET/ GENESIS, and KAIBAB NATIONAL GROUP, INC., a MINNESOTA CORPORATION, d/b/a GENESIS SYSTEMS CORPORATION,

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PETITION FOR WRIT OF CERTIORARI

The petitioners, Amerinet, Inc. and Kaibab National Group, Inc., pray that a Writ of Certiorari issue to review the

decision and judgment of the United States Court of Appeals for the Eighth Circuit entered in this action on August 26, 1992.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 972 F. 2d 1483 (8th Cir. 1992). It is reprinted in the appendix ("App.") at A1-115. The District Court's unpublished opinion and order granting partial summary judgment in favor of Xerox is reprinted at App. B1-61.

JURISDICTION

The Court of Appeals entered judgment on August 26, 1992. This petition for writ of certiorari was filed within 90 days of that date, and this Court has jurisdiction to review the judgment by writ of certiorari under 28 U.S.C. SS 1254 (1)

STATUTORY & CONSTITUTIONAL PROVISIONS INVOLVED

The statutes involved are 15 U.S.C. SS 1 and 2. The constitutional provisions involved are the Seventh Amendment of the U.S. Constitution and Article I, SS 4 of the Minnesota State Constitution. These are set out verbatim at App. C1-4.

STATEMENT OF THE CASE

A. THE PARTIES

The petitioners, Amerinet, Inc. and Kaibab National Group, Inc., hereinafter referred to as "Amerinet" or "petitioners", are Minnesota corporations formerly engaged in the business of reselling new and used data processing equipment, including printers. Amerinet acted as a broker and reseller of this equipment purchasing same from various sources and then reselling it. (App. A3,7-8; B2-4)

Xerox Corporation, hereinafter referred to as "Xerox" or "respondent", is a New York corporation which, among other things, manufactures and sells a vari-

ety of laser printing equipment. (App. A3; B2) Laser printers operate at very high rates of speed and use computer driven memory rather than reflected light or impact printing to create the copied image. (App. B5-6) Xerox also remanufactures and sells its used laser printers coming off lease. Remanufacturing consists of the refurbishing and upgrading of a used machine into an upgraded technology. Xerox supplies parts, materials, and upgraded technology for its printers and also repairs and services them. (App. A10-11; B2, 8-10)

B. THE EQUIPMENT IN CONTROVERSY

This controversy involves the resale of Xerox's used printing equipment, specifically the 9700 and 8700 families of the Xerox laser printer. (App. A9-10) These laser printers had numerous features which were unique to Xerox's machines and not available on any other ma-

chine until IBM introduced a new model in 1988. (App. A9-10; B6-9) The list price for Xerox's 9700 Laser Printer was approximately $400,000.00 with additional costs for extra features (App. A10)

As a result of the unique features and the ensuing demand, a separate market for these printers developed. Continued maintenance for these machines was essential to assure operation at an optimal level. (App. A10) At all times material to this controversy, there was no organization, other than Xerox, which provided maintenance and parts for such equipment, thus making users of such equipment extremely dependent upon Xerox for these items. (App. A11; B8-10) Xerox admitted it controls 98% of the maintenance supply for its laser printers. (App. A11; B9)

C. INDUSTRY STANDARDS

Standard industry practices evolved

for the maintenance and upgrade of computer equipment, including laser printers. Because such equipment is costly to purchase and maintain, owners purchase full service maintenance agreements at the time of installation whereby in exchange for regular fixed payments, the manufacturer will maintain, repair, and upgrade the equipment. (App. A10-11; B8-9) An active market for used computer equipment depends upon the availability of such maintenance policies. Since Xerox is the lone source of parts and maintenance for its laser printers, the market for such used equipment is entirely dependent upon the availability of these services from Xerox. The vast majority of these machines were under full service maintenance by Xerox.(App. A10-11; B8-9)

Upon transfer to a new location, manufacturers of computer equipment issue letters of certification for used equip-

ment in which they certify in writing that used equipment has been under maintenance and is eligible for continued maintenance without a further charge or inspection. (App. A11-12; D2-3) Data processing manufacturers generally announce all major policy changes, including maintenance, price or end-of-life to give customers a reasonable time to react. (App. D3-5) The industry normally does not set fixed periods for the assured availability of maintenance. (App. D6) Unless the manufacturer makes an end-of-life announcement, it is understood that maintenance will be available from the manufacturer for as long as the equipment remains on the market. (App. B10-11; D7) Industry standards are the same for all owners. Since the required software for laser printers is expensive and not transferable, it is difficult for users to change machines and for new man-

ufacturers to enter the market.

D. AMERINET'S INVOLVEMENT IN THE RESALE OF USED XEROX LASER PRINTERS

In 1986 Amerinet became involved in reselling used Xerox laser printers. (App. A8) The prices at which Amerinet offered to sell such equipment were considerably less than Xerox's prices and the equipment performance levels were shown to be equivalent to the machines offered by Xerox. (App. A26-27; D8) At the time, Xerox appeared supportive of such remarketing and was following industry maintenance standards.

During 1986 Amerinet completed two Xerox laser printer sales, one to Meijer, Inc. and the other to Franklin Mint, and realized gross profits of $65,000.00 and $45,000.00 respectively. (App. A8) In both cases, Xerox provided letters of certification of maintenance. After 1986, despite negotiating with many par-

ties, Amerinet was unsuccessful in concluding any sales of such equipment. (App. A9, 26) Amerinet believes its inability to sell any more of these printers was due to anticompetitive and tortious policies and conduct by Xerox in 1987 which dried up the resale market. (App. A21-22) Amerinet also contends Xerox's behavior during the Meijer sale severely damaged its longstanding relationship[1] with Meijer and caused a loss of substantial sales of non-Xerox products to that firm. (App. A103)

E. XEROX'S WRONGFUL POLICIES AND CONDUCT

1. THE MEIJER TRANSACTION

In June of 1986, Amerinet offered to sell Meijer a used Xerox machine for $295,000.00 while Xerox proposed to sell a unit it was leasing to Meijer for

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[1]Meijer, Inc. had been a customer of Amerinet since 1980, and Amerinet had achieved preferred vendor status with Meijer. (App. A103)

$345,000.00. (App. A30,104) Upon learning of Amerinet's offer, Xerox took the following anticompetitive and tortious actions: a) made disparaging statements about remarketers and secondary market equipment; b) threatened they would not put the Amerinet unit under maintenance; c) later indicated they would put the unit under maintenance but stated it would cost more to maintain same; d) threatened to impose inspection and other fees on the Amerinet unit, even though it would be inspected and certified for maintenance by Xerox prior to shipment. (App. A30,104-105)

After being awarded the Meijer contract at a price of $268,000.00, Amerinet's problems with Xerox continued. Xerox was extremely slow in providing parts for a firm upgrading the Meijer machine and Xerox was slow in installing the unit at Meijer's location. (App.

A31,105) Xerox presented Meijer with a $27,000.00 bill for alleged problems with the machine despite the fact that it was inspected and certified by Xerox personnel before shipment to Meijer. (App. A31,105) Meijer was displeased with Amerinet following the transaction and blamed Amerinet for the difficulties. (App. A31,106)

2. THE SUPPLEMENT AND ITS USE

On January 1, 1987, without notice to its customers, Xerox adopted a supplement to its full service maintenance agreement for its laser printers.[2] Most significantly, the supplement provided that full service maintenance availability extended only to the original title holder of the equipment and any attempts to transfer title would cause the period of assured

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[2]The relevant portion of the supplement is reproduced at App. A12-14.

maintenance availability to expire. App. A12-14) The supplement established limited periods for the assured availability of maintenance. (App. A12-14)

Once the assured period of maintenance availability expired, Xerox could then inspect and charge a published inspection fee[3], assess annual 10% service escalator charges, issue a written estimate of charges to place the equipment under maintenance for the next twelve months, and cancel the right to maintenance and nonrenew the service agreement at the end of any year. (App. A12-14) Maintenance was made conditional from one year to the next. The supplement was contrary to industry standards, had no legitimate business purpose. (App. A25-26) It was not tied to the age, condition, or prior sta-

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[3]Xerox never published an inspection fee but charged fees ranging from $25,000.00 to $125,000.00 for inspections.

tus of a transferred machine. (App. A25-26)

The evidence showed Xerox was concerned about third-party competition, and adopted the supplement and a sales call strategy in response to the competition with the intent of taking over the third-party market. (App. A28-29;B26-28) The supplement virtually precluded the purchase of a used Xerox laser printer on the secondary market because of concerns over the cost and availability of maintenance. An industry expert testified the supplement dried up the resale market for used Xerox laser printers. (App. E1-5)

Xerox's aggressive utilization of its policy to prevent third-party competition in the resale of its used machines is illustrated by Amerinet's experience in potential transactions with Massachusetts Mutual Insurance Company and New York Life. In both cases, Amerinet offered to

sell used laser printers at prices substantially below those offered by Xerox, but was unable to conclude these transactions because of Xerox's policy and behavior.

In February of 1987, Amerinet offered to sell Massachusetts Mutual a used printer for $250,000.00 but Massachusetts Mutual ended up purchasing from Xerox. (App. A28) The following evidence showed this lost sale to be caused by Xerox's policy and behavior: a) it made economic sense for that firm to purchase a lower priced machine from Amerinet since the respective performance levels of the machines were the same; b) Xerox controlled the supply of essential maintenance; c) Xerox made Massachusetts Mutual aware of the negative terms of the supplement after learning of third-party competition; d) a representative of Massachusetts Mutual involved in the pur-

chase decision indicated the terms of the supplement were a consideration in the purchase decision; (App. A27,48) e) Xerox's analysis prepared at Massachusetts Mutual's request calculated the total cost of the 10% escalator clause over seven years to be $358,176.00 over and above normal annual maintenance costs; (App. F1) f) the company's own analysis comparing the costs of a new machine purchased from Xerox with no 10% surcharge versus a third-party machine with an immediate surcharge concluded that over five years the used printer would cost $63,798.00 more than the new one; $185,000.00 of the used printer's cost is solely attributable to the 10% surcharge; absent such surcharge, the used printer's operating costs would be $120,000.00 less than the new unit's over five years; (App. A27-28; G1-3) g) the company's analysis also calculated costs over a

five year period for an additional unit plus its four existing owned units with and without the application of the surcharge thereby suggesting Xerox threatened to impose the surcharge on the company's existing machines if it made a third-party purchase. (App. G1-3)

Amerinet negotiated with New York Life for the sale of a used machine, but the latter's awareness of the supplement was revealed in a note from an assistant vice-president of that firm to Amerinet's sales representative (App. H1) Additional documentary evidence indicated the company's concerns about Xerox' actions if a third-party machine was purchased. (App. A28-29; I1-3; J1-2) New York Life also received an analysis from Xerox comparing the benefits of purchasing a machine from it versus the lack of benefits of a third-party machine because of the supplement. (App. A28-29; K1) New York

Life eventually bought from Xerox, and the facts strongly suggest this lost sale was caused by Xerox's policy and conduct.

F. THE EFFECT OF XEROX'S WRONGFUL POLICY AND CONDUCT ON AMERINET

During the period from January 1, 1987 through May of 1987, Amerinet actively negotiated with many parties for the sale of used Xerox machines and made over 100 sales offers. It was unsuccessful in concluding any sales. (App. A9,26) After May of 1987, Xerox's policy and conduct forced Amerinet out of the business of remarketing these machines thereby cutting off an anticipated source of substantial revenue and resulting in a loss of Amerinet's sales personnel. Amerinet also saw its sales to to Meijer plummet from $1,000,000.00 in 1986 to $100,000.00 in 1987 when Amerinet expected approximately $1,200,000.00 in sales to Meijer in 1987, plus a $1,000,000.00 order

placed in 1986 but deferred until 1987 which was never closed. (App. A103-104; L1-7) In November of 1988, financial difficulties caused by the exclusion of Amerinet from the Xerox laser printer resale market and damage to its relationship with Meijer caused by Xerox compelled it to cease operations. (App. A9)

G. PROCEEDINGS BELOW AND DISPOSITION

In May of 1987, Amerinet commenced this action in the U.S. District Court for the District of Minnesota, Fourth Division, alleging Xerox had violated Section 2 of the Sherman Act (15 U.S.C.SS 2) by engaging in policies and conduct injurious to Amerinet which constituted monopolization or an attempt to monopolize. (App.A2) Amerinet also raised tort claims under Minnesota law for tortious interference with prospective business advantage, unfair competition, business dis-

paragement, and defamation. (App. A2-3) Federal jurisdiction was founded on 28 U.S.C. SS 1337 and 15 U.S.C. SS 15 (Commerce and antitrust regulations) along with diversity jurisdiction under 28 U.S.C. SS 1332.(App.A3) Amerinet was later allowed to add a claim for "tying" under Section 1 on the Sherman Act (15 U.S.C. SS 1). (App.A2)

Xerox moved for summary judgment on all claims, and in a decision issued on July 11, 1989, the District Court, the Honorable Diana E. Murphy, presiding, granted summary judgment on the antitrust and disparagement claims and denied summary judgment on the tortious interference and defamation claims. (App.A4) A jury trial[4] was held on the remaining

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[4]The trial began before Judge Murphy but was recessed and later resumed before the Hon. Bruce M. Van Sickle who presided by the agreement of the parties. (App. A5)

claims[5] and on February 15, 1991, the jury returned a general verdict in favor of Amerinet on the tortious interference claim and assessed damages in the amount of $1,000,000.00 (App. A5-6) Xerox's motion for judgment notwithstanding the verdict was denied and judgment on the verdict was entered. (App. A6; M1; N1-5) Thereafter, Xerox appealed from the judgment, while Amerinet appealed from the portions of the summary judgment decision adverse to it.

The United States Court of Appeals for the Eighth Circuit in an opinion by the Honorable Frank A. Kaufman, Senior United States District Judge for the District of Maryland, sitting by designation, affirmed the District Court's grant of summary judgment on the antitrust and disparagement claims and reversed the

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[5]Amerinet withdrew its defamation claim during trial. (App. A6)

District Court's denial of judgment n.o.v. on the tortious interference claim. (App. A1, 114-115)) The case was remanded with direction to enter judgment for Xerox on that claim. (App. A115)

With respect to the monopolization and attempt to monopolize claims, the District Court granted summary judgment because it believed Amerinet had not provided sufficient evidence of antitrust injury, causation and damages. (App. B36-48) The Court of Appeals agreed that Amerinet had failed to sufficiently establish the causal link between its decline and the alleged violations and had not established any reasonable basis for the determination of its damages (App. A39) The Eighth Circuit believed Amerinet's decline was caused at least partly, if not substantially by other factors (App. A41)

The Court of Appeals found Amerinet's

evidence of the amount of its damages to be speculative because it was based on projected sales of an item in which Amerinet had not established a business. (App. A53-54) In the Court's opinion, Amerinet had also not shown any experience in the sales of laser printers or that its sales experience was similar to the marketing of laser printers.(App. A54)

On the tying claim, the District Court granted summary judgment because it felt there was no showing of coercion or an illegal tying arrangement. (App. A60-61) The Eighth Circuit concluded there was no explicit tying arrangement here and believed this was not a case where the defendant's policy made the purchase of the tying and tied products together the only viable economic alternative.(App. A64-66) The Court felt the facts showed both Massachusetts Mutual and New York Life be-

lieved they could have purchased a third-party machine despite the supplement. (App. A66)

As will be discussed in the Argument, the Eighth Circuit rejected Amerinet's reliance on the language from Jefferson Parish Hospital District No. 2 v. Hyde, 466 U.S.2,12,104 S. Ct. 1551, 80 L. Ed. 2d2 (1984) wherein the Court discussed forcing a buyer to purchase a tied product he "might have preferred to purchase elsewhere on different terms." (App. A67-69) As to the business disparagement claims based on the loss of non-Xerox sales to Meijer, the District Court's grant of summary judgment was affirmed on the grounds that Amerinet had failed to plead or prove special damages. (App. A78-80)

With respect to the tortious interference claim, the Eighth Circuit noted that Minnesota had adopted the Restatement

(Second) of Torts (1979), Section 766B and the requisite elements were set forth therein. (App. A86-87) Minnesota also recognized the competitor's privilege stated in Section 768 of the Restatement, and the parties were competitors in this situation. (App. A87,90) The ultimate issue then became whether Xerox had acted outside the competitor's privilege because it had used wrongful means. (App. A92)

The Eighth Circuit ruled Amerinet did not provide sufficient evidence which would allow a reasonable jury to conclude Xerox had acted outside the competitor's privilege by using wrongful means. (App. A98) Amerinet's causation case was also thought to be deficient although the decision was not based on this belief. (App. A107-108) Finally, the Eighth Circuit concluded Amerinet had failed to meet its burden to show damages. (App.

114) Amerinet's projections of used laser printer sales were believed to be speculation, and the Court was not convinced $1,000,000.00 in sales to Meijer were reasonably certain to occur absent wrongful interference by Xerox. (App. A112-113) Thus, the Court concluded judgment n.o.v. should have been granted. (App. A114)

REASONS FOR GRANTING THE WRIT AND ARGUMENT

I. IN REVERSING THE DISTRICT COURT'S DENIAL OF JUDGMENT N.O.V. AND IN DIRECTING JUDGMENT FOR XEROX ON THE TORTIOUS INTERFERENCE CLAIM, THE EIGHTH CIRCUIT HAS GREATLY DEPARTED FROM THE ACCEPTED, CONSTITUTIONALLY MANDATED STANDARDS OF REVIEW CONCERNING JURY VERDICTS SO AS TO REQUIRE THE SUPREME COURT TO EXERCISE SUPERVISION.

A. INTRODUCTION

Under Supreme Court Rule 10, one of

the criteria the Court may consider in determining if it should grant certiorari is whether a Court of Appeals has so far departed from the accepted and usual course of judicial proceedings so as to call for an exercise of the Court's power of supervision. The Eighth Circuit's reversal of the District Court's order denying judgment n.o.v. represents a dramatic departure from accepted, constitutionally founded judicial standards thus making Supreme Court intervention necessary.

B. CONSTITUTIONAL FOUNDATIONS

The Seventh Amendment of the U.S. Constitution preserves the right of trial by jury in civil actions and respects facts tried by a jury. Similarly, Article I, Section 4 of the Minnesota State Constitution guards this jury trial right. Given these constitutional protections, stringent standards of review have

evolved for analyzing motions for judgment n.o.v., etc. In Lumbermen's Mut. Casualty Co. v. Elbert, 348 U.S. 48, 75 S. Ct. 151, 99 L. Ed. 59 (1954) the Court indicated appellate review of jury verdicts is limited by the Seventh Amendment's provision which prohibits facts tried by a jury from otherwise being re-examined in any court in the United States, than according to the rules of common law.

C. APPLICABLE STANDARDS OF REVIEW

Minnesota law and federal law have enunciated similar stringent standards for addressing motions for directed verdict or judgment n.o.v. In Hughes v. Sinclair Marketing, Inc., 389 N.W.2d 194,198 (Minn.1986), the Minnesota Supreme Court stated "this court will sustain a jury verdict if it is possible to do so on any reasonable theory of the evidence." A jury verdict will be set

aside only if manifestly contrary to the evidence when viewed in the light most favorable to the verdict. Lesmeister v. Dilly, 330 N.W.2d 95, 100 (Minn. 1983)

In reviewing motions for judgment n.o.v. courts must: "(a) consider the evidence in the light most favorable to the prevailing party, (b) assume that the jury resolved all conflicts of evidence in favor of that party, (c) assume as true all facts which that party's evidence tended to prove, (d) give that party the benefit of all favorable inferences which may be reasonably drawn from proved facts, and (e) deny the motion if in light of the above reasonable jurors could differ as to the conclusions that could be drawn from the evidence." Northside Mercury Sales & Serv. v. Ford Motor Co., 871 2d 758, 760 (8th Cir.

1989)[6] According to Illinois C. R. Co. v. Stufflebean, 270 F. 2d 801 (8th Cir. 1959) an appellate court cannot try the case de novo and substitute its judgment for the jury's. The Court of Appeals did not follow these standards in analyzing this case and thereby deprived Amerinet of its constitutionally protected jury trial right.

D. WRONGFUL MEANS DISCUSSION

The ultimate issue on the tortious interference claim was whether Xerox had acted outside the competitor's privilege by using wrongful means. To constitute wrongful means, the conduct had to be independently actionable and itself capable of forming the basis of liability for the actor. Conoco, Inc. v. Inman Oil Co.,

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[6]The appellate court conducts a de novo review using the same tests as the trial court. See Pumps & Power Co. v. Southern States Industries, Inc., 787 f. 2d. 1252, 1258 (8th Cir. 1986)

774 F. 2d 895, 907 (8th Cir. 1985) and Briner Electric Co. v. Sachs Electric Co., 680 S.W. 2d 737 (Mo. App. 1984) At trial, Amerinet presented sufficient evidence from which the jury could reasonably have concluded Xerox committed breach of contract, misrepresentation, and fraud, any of which would be independently actionable.

The breach of contract theory was based on evidence that it took almost 90 days to deliver the parts ordered for the Meijer machine when the normal delivery time would have been two to four weeks. (App. A95) From these facts, a reasonable jury could have found Xerox breached an agreement with Amerinet to supply such parts within a reasonable time. The Eighth Circuit, however, decided these facts did not form the basis for a reasonable inference that Xerox had entered into, much less breached a contract.

(App. A95)

The case for fraud and misrepresentation was founded upon events during the Meijer transaction, general evidence about the use of the supplement, and the dealings with Massachusetts Mutual and New York Life. As to Meijer, the evidence showed Xerox had deinstalled, inspected, and certified the machine being purchased by Meijer at the transferor's location in Texas. (App. A97) After the machine was transferred to Meijer in Michigan, Xerox advised Meijer the machine was in poor condition, presented Meijer with a $27,000.00 bill for alleged problems with the machine, and indicated the machine might not reach the same performance level as their prior leased unit from Xerox until after six months. (App. A31, 105; O1-3) In representing this machine to be in poor condition after certification by Xerox and then presenting a

$27,000.00 bill for alleged problems, a jury could have easily found Xerox committed misrepresentation or fraud. Actual performance experience also showed the Amerinet machine reached the performance level of the prior leased unit from Xerox in two months. (App. 02-3)

The jury could have reasonably found Xerox's usage of the supplement materially misrepresented the condition of Xerox laser printers on the secondary market. Since the vast majority of Xerox laser printers were under maintenance from Xerox, they should have been at or near peak operating condition when being transferred, assuming proper maintenance by Xerox. Thus, printers on the resale market should have been in prime condition.

For Xerox to utilize its policy so as to imply that third-party machines, maintained by Xerox, have serious mainten-

ance problems which justify costly surcharges, etc. misrepresents the true picture to potential purchasers and harms resellers. In essence, Xerox is telling both parties a Xerox-maintained machine is junk when it should be in peak condition.

The jury could reasonably infer misrepresentation from the New York Life and Massachusetts Mutual matters. While the Xerox representative for the New York Life account, admitted he did not know why a $25,000.00 charge should be made for a Xerox-maintained unit under full service maintenance which was deinstalled and shipped by Xerox, his "remanufactured vs. as is" analysis for New York implied that a third-party machine buyer did not know what he was getting even though the machine had been maintained by Xerox. (App. P1; K1) The $358,176.00 escalator analysis prepared for Massachu-

setts Mutual gave it the wrongful impression that third-party machines were in bad shape and the escalator was necessary to maintain them. (App. F1) The Eighth Circuit, however, found this evidence deficient as to reliance and pecuniary loss and concluded there was insufficient evidence of wrongful means. (App. A96-98)

In reviewing the evidence, the Court went beyond the bounds of its well defined reviewing function. Instead of determining whether there were sufficient facts from which a reasonable jury could find wrongful means, the Court assumed the role of trier-of-fact and decided the issue. It did not view the evidence in the light most favorable to the verdict.

The Court ignored evidence showing a breach of contract and Meijer's displeasure with Amerinet. The Eighth Circuit disregarded substantial misrepresentation evidence and facts establishing that the

supplement was considered by two potential buyers in their purchase decision. The Court overlooked a substantially lower price for an equivalent quality machine and the economic sense it made to purchase from Amerinet. From this evidence, reasonable minds could, and did, conclude Xerox utilized wrongful means. The Eighth Circuit, however, "re-tried" the case and decided it in accordance with its own view of the evidence.

E. CAUSATION DISCUSSION

In questioning Amerinet's causation evidence based on the Meijer transaction, the Court failed to give due weight to Amerinet's longstanding relationship with Meijer, anticipated 1987 sales to that firm which were never realized, and Meijer's displeasure with Amerinet following the transaction. (App. A103-106; L1-7) In rejecting the causation facts involving the usage of the supplement to cause lost

Xerox sales and destroy Amerinet's business, the Court complained of a failure to differentiate losses caused by Xerox from other possible causes of decline. (App. A100-101) That finding ignored the fact that reasonable minds could still find Xerox's behavior caused lost sales even if the business destruction claim was untenable. Furthermore, Amerinet's industry expert testified the supplement caused the end of the Xerox laser printer resale market and its damages expert believed Amerinet would have survived if it had been able to make some Xerox sales. (App. E1-5; A43-44)

F. DAMAGES DISCUSSION

The Eighth Circuit's conclusion that Amerinet's damages evidence, based on projected Xerox sales and sales of non-Xerox products to Meijer, was too speculative again underscores its "re-trial" of this case. (App. A113) In light of a

$1,000,000.00 order deferred by Meijer until 1987 but never concluded, coupled with the parties' longstanding business relationship, a reasonable jury could find the sales projections to Meijer entirely plausible. (App. A103; L1-7) As to Xerox sales, even if the petitioners' damages expert was incredible, the evidence of lost profits in New York Life and Massachusetts Mutual matters, achieved profits in the 1986 transactions, and Amerinet's list of sales offers would still have given the jury a sufficient basis for assessing damages.

G. TORTIOUS INTERFERENCE CONCLUSION

In reviewing the verdict, the Eighth Circuit clearly departed from accepted, constitutionally founded standards of review and decided the case in accordance with its own view of the evidence. While the substantive aspect of the tortious interference claim is a state issue of

limited impact, the procedural implications of the decision are of extreme national importance because they involve the erosion of the constitutionally protected jury trial right. Constitutional protection of this right rings hollow if the Courts are allowed to depart from the stringent review standards that buttress this right. Clearly, this verdict should have been upheld. Accordingly, when a Court of Appeals does not follow these stringent standards of review, the Supreme Court must be concerned about the erosion of the jury trial right which occurs if the abuse is not corrected. Thus, the Supreme Court should grant certiorari to correct the same.

II. IN GRANTING AND AFFIRMING SUMMARY JUDGMENT ON AMERINET'S ANTITRUST CLAIMS, THE LOWER COURTS DEPARTED FROM ACCEPTED SUMMARY JUDGEMENT STANDARDS IN AN AREA OF NATIONAL ECONOMIC IMPORTANCE, AND SUPER-

VISION IS THEREFORE REQUIRED BY THE SUPREME COURT.

A. INTRODUCTION AND ECONOMIC IMPORTANCE

In granting and affirming summary judgment on Amerinet's antitrust claims, the lower courts dramatically departed from accepted standards of review for summary judgment. Such departure must be reviewed pursuant to Rule 10 since it involves the application of federal law in an area of national economic importance.

Amerinet was a small service business in the data processing industry. In view of the expansion of the service sector of the U.S. economy, service businesses are now a vital part of our economy.[7] The

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[7]According to statistics from the U.S. Dept. of Commerce, Bureau of Economic Analysis, in 1989 the private service industry produced 883 billion dollars of national income while 803.8 billion was derived from manufacturing. Total national income produced by private industries for that year was 3,584.9 billion dollars.

data processing industry, of course, constitutes a significant part of the economy with the remarketing segment alone being a 30 billion dollar per year industry. Thus, issues of antitrust law concerning service businesses and the data processing industry are of great importance in this country, and the Court must insure summary judgment standards are followed in evaluating antitrust claims affecting these areas.[8] Small service businesses, which include the majority of data processing remarketers[9], particularly rely on the antitrust laws since they lack the economic strength possessed by manufacturers.

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[8]The substantial number of antitrust cases concerning the data processing industry filed in the last five years also demonstrates this is a very active and important area of litigation.

[9]The majority of remarketers are small entities with annual sales of $5,000,000.00 or less.

After examining the significant role of the data processing remarketer, the correction of the lower courts' departure becomes even more important to the economy. While often portrayed unfavorably by manufacturers, remarketers actually stimulate the economy by keeping prices lower for the consumer and giving manufacturers the incentive to develop better equipment for the consumer and thereby stay ahead of the competition. Price competition and the development of new technology are, of course, essential for economic growth. Remarketers also expand the market for a manufacturer's equipment since their lower prices make equipment available to consumers otherwise unable to afford the same and thus provide manufacturers with additional sources of income for support services.

The remarketer is particularly important in an equipment market with no com-

petition from other manufacturers because the remarketer then becomes the only entity offering a price alternative to the consumer. In Eastman Kodak Co. v. Image Technical Services, Inc., 504 U.S. _____, 112, S. Ct._____, 119 L. Ed. 2d 265 (1992), the Supreme Court granted certiorari to address the use of summary judgment in an antitrust case involving aftermarkets for parts and services for a manufacturer's equipment where the manufacturer had no market power in the primary market for equipment. From the consumer's standpoint, however, the Court should be even more concerned with a situation in which summary judgment is misused to defeat an antitrust claim where the manufacturer possessed monopoly power in the equipment market since the latter situation represents a greater threat to competition and consumer well-being.

Antitrust protection of remarketers is

also of great importance to lessors of data processing equipment and the investors funding these ventures. The leasing of data processing equipment is a substantial business itself with both major financial institutions, many of whom are lessors themselves, and small investors having invested considerable funds to finance these arrangements. An underlying expectation in leasing is that the equipment will have a residual value at the end of the lease term when it will then be sold. Anticompetitive policies, however, diminish the residual value of leased equipment hurting the lessor who will some day try to remarket the equipment and his investors who do not achieve the anticipated return on their investment.

From the foregoing discussion, it is clear that the Court of Appeals' departure from accepted standards of judicial review governing summary judgment is not

merely an issue of concern only to the parties of this litigation, but instead is a matter of national economic importance affecting small service businesses, the data processing industry, and most importantly the consumer of data processing equipment. In NLRB v. Pittsburgh S.S. Co., 340 U.S. 498, 71 S. Ct. 453, 95 L. Ed. 479 (1951), the Supreme Court indicated certiorari is appropriate in cases involving principles the settlement of which is of importance to the public as distinguished from the parties.

B. SUMMARY JUDGMENT STANDARDS

When one examines the standards of review for summary judgment and the tying and antitrust damages evidence, there is no doubt the lower courts dramatically departed from these standards in their decisions. Under Rule 56(c) of the Federal Rules of Civil Procedure, summary judgment shall be rendered if the plead-

ings, etc. show there is no genuine issue of material fact and that the movant is entitled to judgment as a matter of law. On summary judgment, all facts and inferences must be viewed in the light most favorable to the respondent. Datagate v. Hewlett-Packard Company, 672 F.Supp. 1288 (N.D.Cal.1987)[10]

In Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986), the Supreme Court noted that "at the summary judgment stage the judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." According to Anderson, summary

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[10]Appellate courts conduct a de novo review applying the same standards as the trial court. Lone Ranger Television, Inc. v. Program Radio Corp., 740 F.2d 718 (9th Cir. 1984) and Vette Co. v. Aetna Casualty & Surety Co., 612 F.2d 1076(8th Cir.1980)

judgment will not lie if the dispute about a material fact is `genuine,' that is, if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Anderson, 477 U.S. at 248. A nonmovant, however, is not required to produce evidence in a form admissible at trial in order to survive summary judgment. Celotex Corp. v. Catrett, 477 U.S. 317, 106 S. Ct. 2548, 91 L. Ed. 2d 285 (1986)

C. ANTITRUST DAMAGES - SUBSTANTIVE LAW

In affirming summary judgment on Amerinet's monopolization claim, the Eighth Circuit believed its case was deficient as to causation and a reasonable basis for the determination of damages. The Court in Bigelow v. RKO Radio Pictures, 327 U.S. 251, 263, 264, 66 S. Ct. 574, 90 90 L. Ed. 652, (1946) discussed standards of proof for antitrust damages at trial and commented that"... the jury could

conclude as a matter of just and reasonable inference from the proof of Defendants' wrongful acts and their tendency to injure plaintiffs' business, and from evidence to the decline in prices, profits and values, not shown to be attributable to other causes, that Defendants' wrongful acts had caused damage to the plaintiffs." Bigelow, 327 U.S. at 263-264. The jury could act on the probable and inferential as well as positive proof. Bigelow, 327 U.S. at 263-264.

Zenith Corp. v. Hazeltime, 395 U.S. 100, 114, 89 S. Ct. 1562, 23 L. Ed 2d 129 (1969), indicated an antitrust plaintiff must show at trial that the defendants' conduct was a material cause of the injury; the plaintiff is not required to exhaust all possible alternative sources of injury to sustain his burden of proof. As to the amount of damages, the Court in Moore v. Jas. H. Matthews & Co, 682 F. 2d

830, 836 (9th Cir. 1982) indicated "an antitrust plaintiff is only obligated to provide the trier-of-fact with some basis from which to estimate reasonably, and without undue speculation, the damages flowing from the antitrust violations."

D. ANTITRUST DAMAGES DISCUSSION

1. CAUSATION

Amerinet's position on fact of injury and causation is that the supplement and Xerox's usage thereof precluded potential customers from purchasing a used printer from Amerinet. The general facts surrounding the supplement and the specific facts of the New York Life and Massachusetts Mutual negotiations support this contention.

The supplement's provisions were costly, contrary to industry standards, and without a legitimate business purpose. Xerox controlled the supply of essential maintenance and took actions to control

the used equipment market. The equipment offered by Amerinet was equivalent to that supplied by Xerox with the price of the former being significantly less than the latter's price.

The foregoing facts, along with the earlier described insurance company matters, show a genuine issue as to whether the supplement and Xerox's maintenance control prevented customers from acquiring a printer from Amerinet. Amerinet has established a genuine controversy in accordance with Anderson, and its facts satisfy the substantive requirements of Zenith and Bigelow keeping in mind that the foregoing are trial requirements and Amerinet is not required to produce evidence in a form admissible at trial in order to survive summary judgment.

In addressing causation, the Eighth Circuit failed to view the facts and inferences in the light most favorable to

Amerinet and exceeded its function under Anderson by weighing the evidence and determining causation itself. Its conclusions that it is difficult to imagine how Xerox's conduct could completely destroy Amerinet within eight months[11] and that its claim is economically implausible exemplify these errors. (App. A39-40) Viewing in the light most favorable to Amerinet its evidence as to 1) its expected income from printer sales 2) its two 1986 sales, and 3) its inability to make sales after the adoption of the supplement, a genuine issue certainly existed as to whether Xerox's conduct destroyed Amerinet's business or at least caused lost sales.

The Court's reliance on Matsushita

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[11]This conclusion was also factually incorrect since Amerinet actually went out of business in November of 1988, almost two years after the supplement was adopted.

Electric Industrial Co. v. Zenith Radio Corp., 475 U.S. 574, 587, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986), wherein the Court required the nonmovant to provide more persuasive evidence than otherwise necessary to survive summary judgment when its claim makes no economic sense, is misplaced because this situation is distinguishable from Matsushita. (App. A40) In Matsushita, the plaintiffs alleged a group of Japanese firms engaged in a 20 year conspiracy of pricing their products below cost in the United States with the hope of expanding their share of the U.S. market in the future. Not surprisingly, the Court found summary judgment appropriate because there was no rational motive to conspire; the defendants had every incentive not to engage in conduct which required them to sustain decades of losses with no foreseeable profits. 475 U.S. at 597.

In this case, however, Amerinet's claim makes complete economic sense since Xerox's policy was intentionally designed to give it profits from sales of used machines, and Amerinet's causal inferences are entirely reasonable thereby obviating the need for any more persuasive proof. According to First National Bank of Arizona v. Cities Service Co., 391 U.S. 253, 288-289, 88 S. Ct. 1575, 20 L. Ed. 2d 569 (1968), a defendant meets his burden under Rule 56 when he shows that the facts relied upon to support plaintiffs's allegation were not susceptible to the interpretation sought by the nonmovant. Xerox made no such showing herein.

The Court's finding that Amerinet's decline was caused by other factors further illustrates how the Court exceeded its function. (App. A41) While Amerinet certainly had other problems at the time, its evidence showed Xerox's conduct had

the tendency to hurt its business and it showed two lost sales not attributable to other causes, as required by Bigelow. Under Zenith, Amerinet was not required to exhaust all possible alternative sources of injury, yet the Eighth Circuit believed Amerinet needed to do so. Finally, even if the destruction of business theory was deficient, Amerinet had still shown a genuine issue on the narrower theory of lost sales. In addressing the insurance company negotiations, the Court selected evidence most favorable to Xerox to support its decision, but virtually ignored other evidence, particularly the cost analyses and other documents from which strong causation inferences can be drawn. (App. A46-52; see App. F, G, H, I, J, K)

2. AMOUNT OF DAMAGES

In concluding Amerinet's evidence as to the amount of its damages to be specu-

lative, the Eighth Circuit again failed to view the evidence in the light most favorable to Amerinet and exceeded its function on summary judgment. (App. A53) Under the Moore case, Amerinet was obligated to provide some basis from which to reasonably estimate its damages. Amerinet provided two bases with the first being evidence presented by Mr. Litvak, its damages expert, and the second being the profits from the successful transactions in 1986 and the list of over 100 sales offers by Amerinet. In rejecting Mr. Litvak's testimony as being incredible, the Eighth Circuit erroneously assumed one of the most important functions of the trier-of-fact which is the determination of credibility. (App. A54-55,110) However, even if Litvak's calculations were incredible, the listing of offers and the profits in the 1986 transactions would still provide a yardstick to meas-

ure damages.

When discussing damages, the Eighth Circuit erroneously assumed that the sale of Xerox laser printers was a new business for Amerinet in which it had no track record of success and that expertise in selling laser printers was vital to success in this market. (App. A54) The first assumption overlooks Amerinet's considerable experience in selling data processing equipment. The second assumption loses validity when one considers the Xerox laser printer consumer is a sophisticated purchaser familiar with the equipment it needs and the prices for the same who expressed interest in buying from Amerinet. When dealing with this type of consumer, Amerinet does not need any expertise peculiar to the Xerox machine. It must be able to locate the equipment at the right price, and Amerinet has demonstrated this ability

through its prior two sales.

E. TYING CLAIM - SUBSTANTIVE LAW

In affirming summary judgment on the tying claim, the Eighth Circuit concluded Amerinet had not shown an explicit tying arrangement. (App. A64) The Court also believed this was not a case where Xerox's policy made the purchase of the tying and tied products together the only viable economic option. (App. A64-66) In its decision, the Court again exceeded its summary judgment function and failed to view the evidence in the light most favorable to Amerinet. The Court also wrongly interpreted Jefferson Parish Hospital District No. 2 v. Hyde, 466 U.S. 2, 104 S. Ct. 1551, 80 L. Ed. 2d 2 (1984). (App. A68-69)

In Jefferson Parish, the Court described the essential characteristic of an invalid tying arrangement as follows:

> "Our cases have concluded that the essential characteristic of an invalid tying arrangement lies in the seller's exploitation of its control over the tying product to force the buyer into the purchase of a tied product that the buyer either did not want at all, or might have preferred to purchase elsewhere on different terms." 466 U. S. at 12

According to Nobel Scientific Indus. v. Beckman, 670 F. Supp. 1313, 1324 (D.MD. 1986), (quoting Ways and Means v. IVAC Corp., 506 F. Supp. 697, 701 (N. D. Cal. 1979) aff'd 831 F. 2d 537 (4th Cir. 1987), cert. denied, 487 U.S. 1226 (1988), in the absence of an explicit tying arrangement, an illegal arrangement may still be found"... where the defendant has established its pricing policy in such a way that the only viable economic option is to purchase the tying and tied products together in a single package."

F. TYING DISCUSSION

In this case, a genuine issue certainly existed as to whether there was a tying arrangement of the type described in

Nobel Scientific. Amerinet's position is that Xerox's "offer" of maintenance to a potential buyer of a used laser printer was in practical effect a refusal to sell the tying product (maintenance) on economically acceptable terms unless the tied product (the printer) was purchased from Xerox. If the customer wanted to obtain maintenance on acceptable terms, it had no viable option but to acquire a printer from Xerox when it would have preferred to purchase elsewhere.

The general facts and the specific facts surrounding the insurance company negotiations reveal a genuine issue as to whether Xerox's "offer" was a tying arrangement and its use of the supplement was coercive. When viewed in the light most favorable to Amerinet, the facts showed it made economic sense for the two insurance firms and other companies to purchase from Amerinet had the supplement

not existed and Xerox not controlled the supply of maintenance. From these facts, one can reasonably infer that potential purchasers from Amerinet were forced by the economics of the policy to buy from Xerox in order to obtain maintenance at an acceptable rate. Amerinet's case met the substantive requirements of Jefferson Parish and Nobel Scientific and satisfied Anderson's summary judgment standards.

In concluding there was no "only viable economic option" arrangement, the the Eighth Circuit cited selected statements by Massachusetts Mutual and New York Life representatives in which they indicate their beliefs that those firms could have purchased third-party machines. (App. A66) However, strong documentary evidence suggesting these companies' concerns about the economic impact of the supplement was ignored. (See App. F, G, H, I, J, K) By adjudging certain

evidence to be conclusive despite the presence of compelling contrary evidence, the Court violated its function and failed to view the evidence in the light most favorable to Amerinet. Similarly, in finding Amerinet had not shown Xerox was trying to shield an overpriced product from competition, the Court overlooked Amerinet's substantially lower prices and its ability to obtain equipment at such prices which then allowed it to make sales at lower prices. (App. A67)

When discussing Jefferson Parish, the Eighth Circuit believed the alternative language which describes a tying arrangement as forcing the buyer to purchase a tied product when he"... might have preferred to purchase elsewhere on different terms..." cannot be read in this case to wipe out the core proof of a per se violation namely that the buyer be forced to purchase an otherwise unwanted

tied product. (App. A68-69) Despite this attempt to soften the language, Jefferson Parish is very clear in its alternative definitions of forcing. The real message of Jefferson Parish is that tying arrangements are condemned"... when the seller has some special ability-usually called `market power' - to force a purchaser to do something he would not do in a competitive market." Jefferson Parish, 466 U. S. at 13 and 14.

Regardless of whether the consumer is forced to take an unwanted product or a desired product he might prefer to purchase elsewhere, he is being compelled to do something he would not otherwise do in a competitive market because of seller's power in the tying product market. Either kind of forcing forms the basis of an illegal tying arrangement under Jefferson Parish. The Court's attempt to soften the foregoing language in the con-

text of this case is clearly at odds with the Jefferson Parish decision.

G. ANTITRUST CLAIMS CONCLUSION

Recent events in the world underscore the need to insure the law is correctly applied in the antitrust area with respect to industries of national economic importance. In large part due to economic failings, the Soviet Union and its Eastern bloc disintegrated. Their economic system, based on government monopolization, simply did not work. By enacting antitrust legislation, our Congress wisely chose to protect competition. The Courts must now safeguard competition, especially in areas of national economic importance, by means of correct and vital antitrust decisions.

In this Petition, Amerinet has shown the lower courts' dramatic departure from summary judgment standards and has set forth compelling reasons why the granting

of certiorari to correct such departure is of national economic importance. While the nature of the issues involved required Amerinet to present much factual detail in this Petition, Amerinet urges the Court not to lose sight of the national economic importance which supports the granting of certiorari herein.

CONCLUSION OF PETITION

For the reasons recited in this petition, Amerinet's petition for writ of certiorari should be granted, and it is respectfully requested that the Court grant the same.

Respectfully submitted

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